Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 00-65
Southwestern Bell Communications Services,	)	
Inc. d/b/a/ Southwestern Bell Long Distance	)	
for Provision of In-Region, InterLATA	)	
Services in Texas	)	

COMMENTS OF CCCTX, INC. D/B/A CONNECT!

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SUMMARY

SBC has not demonstrated that the local market in Texas is sufficiently open to competition to warrant grant of its request for interLATA authority in that state. Indeed, its supplemental showing is remarkable in that it has submitted performance data that shows in key respects worsening compliance with governing standards. SBC's showing of timely provision of "hot cuts" and nondiscriminatory provision of DSL capable loops continues to fall below acceptable standards. The Department of Justice found that SBC's performance in these areas created an environment that discriminates against CLECs. That continues to be the case.

SBC is confused insofar as it assumes that compliance with the merger conditions have any bearing on its qualifications to provide interLATA service in Texas. The competitive checklist of Section 271 is an independent legal standard that SBC must meet.

In its earlier comments in this proceeding, Connect called to the Commission's attention the fact that SBC has unlawfully attempted to terminate Connect's interconnection agreement with Connect in Texas. Connect reminds the Commission of this circumstance and that unlawful refusals to interconnect disqualify SBC from receiving interLATA authority under item one of the competitive checklist.

Accordingly, the Commission should deny SBC's application.

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COMMENTS OF CCCTX, INC. D/B/A CONNECT!

CCCTX, Inc. d/b/a Connect! ("Connect"), by undersigned counsel and pursuant to the Commission's April 6, 2000 *Public Notice*, submits these comments concerning the above-captioned application ("Application") of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance (collectively "SBC") as supplemented by additional information filed by SBC on April 5, 2000.[1] For the reasons, stated below the Commission should deny SBC's application to offer interLATA service in Texas.

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1 *Comments Requested on the Application by SBC Communications, Inc. For Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Texas*, Public Notice, CC Docket No. 00-65, DA 00-750, April 6, 2000.

I. SBC HAS ATTEMPTED TO UNLAWFULLY TERMINATE ITS INTERCONNECTION AGREEMENT WITH CONNECT

In its earlier comments concerning SBC's Section 271 application for Texas, Connect brought to the Commission's attention the fact that SBC had previously unlawfully attempted to terminate its interconnection agreement with Connect in Texas.[2] Specifically, notwithstanding that Connect had continually attempted to negotiate a new interconnection agreement and/or opt-in to agreements (which SBC declined to permit), SBC attempted to terminate the current SBC/Connect interconnection agreement on the ground that Connect was not negotiating in good faith. (The current agreement provides that it will continue in effect pending negotiations for a successor agreement.) Connect will not repeat in detail here its previously expressed concerns. However, Connect takes this opportunity to remind the Commission of this issue and that an unlawful denial of interconnection would violate item one of the competitive checklist.[3] Connect has filed a complaint with the Texas PUC concerning SBC's unlawful attempt to terminate its interconnection agreement with Connect which remains pending.[4]

II. SBC'S "HOT CUT" PERFORMANCE IS INADEQUATE

To obtain authorization to provide in-region, interLATA services under section 271, the

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[2] Connect Comments, filed January 31, 2000, p. 2.

[3] *See* 47 U.S.C. § 271(c)(2)(B)(i).

[4] Complaint of CCCTX, Inc. d/b/a Connect! Against Southwestern Bell Telephone Company for Resolution of Dispute Under Interconnection Agreement, PUC Docket No. 22070, filed February 10, 2000.

BOC must show, *inter alia*, that it has "fully implemented the competitive checklist" in section 271(c)(2)(B) of the Act.[5] Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that SBC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[6] In order to establish that it is providing unbundled local loops in compliance with section 271(c)(2)(B)(iv), SBC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors reasonably demand and at an acceptable level of quality.[7]

A key manner of provisioning of unbundled loops is through "the use of coordinated conversions of active customers" -- "hot cuts" -- from the BOC to the competing carriers.[8] This involves manually disconnecting the customer's loop in the BOC's central office and reconnecting the loop at the competing carrier's collocation space.[9] Since the customer is taken

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[5] 47 U.S.C. § 271(d)(3)(A); *Application by New York Telephone Company (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company and Bell Atlantic Global Networks, Inc., for authorization to Provide In-Region, InterLATA Services in New York,* Memorandum Opinion and Order, FCC 99-404, released December 22, 1999, para. 18, 44, *appeal pending sub. nom., AT&T v. FCC*, Case No. 99-1538 (D.C. Cir.)("*New York Order").*

[6] 47 U.S.C. § 271(c)(2)(B)(iv).

[7] *New York Order* , ¶ 269.

[8] *New York Order,* ¶ 291.

[9] *New York Order*, ¶ 291, fn. 925.

out of service while the hot cut is in progress, it is critical that the hot cut be provisioned correctly and coordinated between the BOC and the competing carrier in order to prevent extended service disruptions for the customer.[10]

With respect to SBC's initial application for interLATA authority for Texas, the Department of Justice concluded that "SBC's performance with regard to "hot cuts" is worse than Bell Atlantic's performance in New York.[11] In its supplemental filing, SBC attempts to rectify the initial inadequacies of its data by submitting new data on CHCs and data on FDTs.[12] In regard to FDT cut-overs, SBC asserts that it meets the two hour benchmark 93 percent of the time. For instance, in January 2000, the two hour completion interval was met 95.3 percent of the time, and for February 2000, the two hour interval was met 92.1 percent of the time. The problem, however, is that SBC is required to complete the cutover within two hours 99 percent of the time.[13] Moreover, the data shows performance that appears to be worsening over time. For

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[10] *Id.*

[11] United States Department of Justice Evaluation ("DOJ Evaluation"), p. 27.

[12] *See* SBC *Ex Parte Submission*, pp. 9-11. SBC uses two hot cut processes. One is fully coordinated hot cut ("CHC") process which is to be used for conversions of orders of twenty or more lines. These orders are manually processed and require intensive coordination and communication between SBC and the CLEC. Thus, they are performed outside of normal business hours. FDT cuts are used for cuts of fewer than 20 lines and are performed during normal business hours since they be processed without the manual intervention of SBC representatives. *Id.* at 27.

[13] Conway/Dysert Affidavit p. 5.

example, the premature disconnect for LNP conversions (with Loop) show that three of the four pertinent measures for January and February 2000 exceed the two percent benchmark allowed by the Texas PUC.[14] SBC's performance actually worsened over time as reflected by the fact that in February, 11.2 percent of CHCs were performed prematurely, compared to 0.5 percent in December.[15] Accordingly, SBC is far from meeting the benchmark requirements.

Nor should the Commission permit SBC to argue that its hot cut performance is nonetheless enclose enough to warrant grant of its application. In the *New York Order*, the Commission stated that:

> although we consider Bell Atlantic's demonstrated on-time hot cut performance at rates at or above 90 percent, in combination with the evidence indicating that fewer than five percent of hot cuts resulted in service outages and that fewer than two percent of hot cut lines had reported installation troubles, to be sufficient to establish compliance with the competitive checklist, we view this as a minimally acceptably showing. We are especially concerned with hot cut performance because of the substantial risk that an untimely or defective cutover will result in an end-user customer's loss of service for more than a brief period, as well as the effect of such disruptions upon competitors. We also would be particularly concerned if there was any evidence that Bell Atlantic is competing in the market place in part by suggesting to consumers that there is a possibility of service disruptions when customers switch their service from Bell Atlantic to competing carriers.[16]

In addition to highlighting the critical importance of adequate hot cut performance to

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[14] Letter from SBC to Magalie Roman Salas, April 5, 2000 ("SBC April 5 Letter"), pp. 9-11.

[15] Conway/Dysart Affidavit, p. 5.

[16] *New York Order*, ¶ 309.

CLECs, the Commission unequivocally held that the standard it set in the *New York Order* is a "minimally acceptable showing" and that it "would have serious concerns if the level of performance in any of the three measures were to decline" particularly given the importance of hot cuts.[17] Since, as found by the Department of Justice, SBC's performance is below that of Bell Atlantic's "minimally acceptable showing," SBC's hot cut performance is not sufficient to warrant grant of its application.

SBC attempts to discount the importance of its "hot cut" performance by stating that only 10 to 15 percent of unbundled loops are provisioned using the hot cut process.[18] However, CLECs cannot, as a practical matter, compete effectively if a significant percentage of prospective customers experience significant losses of service in the hot cut process, or if other coordination problems occur, such as continued billing by the ILEC after service has been cut over.

SBC admits a "significant departure from the standard set in New York" concerning unexpected SWBT-caused outages for the FDT method.[19] However, it argues that this doesn't matter because a CLEC that is concerned about possible outages on a particular hot cut can select

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[17] *New York Order*, ¶ 309.

[18] SBC April 5 Letter, p. 8-9.

[19] *Id.* p. 10.

the CHC method."[20] However, this is not much of a choice, because SBC has been trying to discourage CLECs from using the CHC process and may charge more for it. As the Department of Justice, noted:

> [SBC] has encouraged, if not required, CLECs to switch from CHC to FDT for smaller volume loop cuts. SBC has expressed the view that CHC is too resource-intensive to support commercial levels of demand for these lower-loop volume orders and that transition to FDT could alleviate CHC capacity constraints. SBC may charge a premium if CLECs select the intensively manual CHC process. In light of this the use of CHC appears to be rapidly declining, while the use of FDT appears to be rapidly increasing.[21]

Accordingly, the availability of the CHC process can not ameliorate any deficient performance in FDT hot cuts. For all these reasons, the Commission should conclude that SBC's hot cut performance is not sufficient to warrant grant of interLATA authority for Texas.

III. SBC IS NOT PROVIDING NONDISCRIMINATORY ACCESS TO DSL CAPABLE LOOPS

In its order approving Bell Atlantic's application to offer interLATA service in New York, the Commission stated that future Section 271 applicants must "make a separate and comprehensive evidentiary showing with respect to the provision of xDSL capable loops ..."[22] The Commission provided two ways that future applicants could demonstrate nondiscrimination in provision of xDSL capable loops. First, the Commission provided that establishment of a

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[20] *Id.*

[21] DOJ Evaluation, p. 28.

[22] *New York Order,* para. 330.

fully operational separate affiliate for provision of advanced services may provide significant evidence of nondiscrimination.[23] Second, the Commission provided that applicants could demonstrate nondiscrimination in the provision of xDSL capable loops by comprehensive and accurate reports of performance measures even without a separate affiliate.[24] The Commission stated that it had a strong preference for a record that contains data measuring a BOC's performance by state-adopted standards that were developed with input from CLECs.[25] SBC has failed to demonstrate that it is providing nondiscriminatory access to DSL capable loops under either of these approaches.

A. Advanced Solutions, Inc. Is Not Fully Operational

Future Operations Are Insufficient. SBC's showing concerning its separate advanced services affiliate - Advanced Solutions, Inc. - is comprised, with some exceptions, of promises that at some point in the future ASI will be operating. We are told that ASI "will" function in nearly every respect like an unaffiliated carrier in the provision of advanced services;[26] "will" begin utilizing the same processes available to unaffiliated CLECs beginning with an order of

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23 *New York Order* para. 330.

24 *Id.* para. 333-335.

25 *Id.* para. 334.

26 Lincoln Brown Affidavit p. 8.

280 unbundled local loops on April 5, 2000,[27] and that on or about May 29, 2000 ASI "will" use the same processes as CLECs to order line sharing.[28] The Department of Justice estimates that ASI will not be fully operational until October 2000 at the earliest.[29] What is missing is any description of any past, or even current, operations of ASI that would demonstrate that ASI and CLECs obtain services from SBC by the same processes and on the same terms and conditions. SBC's promises of future operations show that ASI is not yet fully operational.

Moreover, to the limited extent that ASI is operating, any such experience has been too recent and too short to warrant any assurances of nondiscrimination. What is needed is sustained experience over a considerable length of time showing that in every respect ASI and CLECs are subject to identical processes in obtaining services from SBC in connection with their provision of advanced services. SBC states that ASI voluntarily began submitting applications for collocation arrangements in the same manner as CLECs on February 29, 2000[30] and became the provider of record for new customers on March 24, 2000.[31] Apart from the fact that these statements disprove SBC's claim in its January application that ASI was then fully operational,

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[27] Lincoln Brown Affidavit p. 2.

[28] Lincoln Brown Affidavit p. 2-3.

[29] Letter from Department of Justice to Magalie Roman Salas, March 20, 2000, p. 6.

[30] *Id.* p. 7.

[31] *Id.* p. 6.

they are simply too recent to constitute sufficient assurance of nondiscrimination against CLECs.

ASI Would Provide Incomplete Protection Against Discrimination. Even assuming that ASI were fully operational, ASI would not adequately safeguard against discrimination because SBC will not provide all of the advanced services that CLECs offer. CLECs will require services from SBC in order to provide IDSL and SDSL which ASI will not be ordering because ASI will not offer retail ISDN and DS1 services. Thus, a fully operational separate affiliate would not offer assurances of nondiscrimination in provision of the unbundled loops that CLECs need to offer IDSL and SDSL services.

For the foregoing reasons, the Commission should give no weight to SBC's advanced services affiliate in determining whether SBC is providing nondiscriminatory access to DSL capable loops.

B. SBC Fails to Meet Performance Standards in Provisioning DSL Capable Loops

The Department of Justice concluded that the performance reports concerning SBC's provisioning of DSL capable loops submitted with its initial application:

> shows a service environment in which CLECs attempting to compete against SBC's retail DSL services are seriously disadvantgaed at present by SBC's inadequate wholesale performance, and may well face greater disadvantages in the future if SBC's performance continues to decline in the face of higher volumes of CLEC orders.[32]

SBC's supplemental showing does not provide any basis for reaching a different conclusion. In

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32 DOJ Evaluation, p. 23.

fact, it is surprising that SBC has used the present opportunity for further consideration of its application to primarily disagree with the standards it must meet to gain Section 271 approval rather than submit information showing improved performance concerning nondiscriminatory provision of DSL capable loops.

For the most part, SBC's performance data speaks for itself in showing substantial discrimination against CLECs in provision of DSL capable loops:

- PM 55.1 (Average Provisioning Intervals). SBC has been out of parity in average provisioning intervals for DSL capable loops for 8 of 11 monthly reports -- nearly one third of the time.[33]

- PMs 65-08, 67-08, and 69-08 (Maintenance and Repair). SBC has not been in parity for 2 of the last 6 months from September 1999 to February 2000 for PM 65-08 (Trouble Report Rate).[34]

- PMs 58-09, 60-08, 60-21, 60-34, 61-08, 62-09, 63-09 (Missed Installation Dates). SBC was out of parity for four of these measure every month in the last six months, and for the other measures was in parity at least some of the time.

- PM 59-08 (Percent Trouble Reports Within 30 Days). SBC reports that under PM 59-08 it failed to achieve parity in three of six months from September 1999 to February 2000.[35]

Simply stated, these reports by themselves show significant discrimination against CLECs.

SBC's attempts to explain away this poor performance are unpersuasive. It contends that

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33 SBC April 5 Letter, p. 12.

34 Chapman Dysart Affidavit p. 15.

35 Chapman/Dysart Affidavit, p. 22.

the Commission should ignore its discrimination against CLECs in terms of higher trouble report rates (PM 65-08) by contending that CLECs average DSL loop trouble report rate over the last 6 months was 5.5 for CLECs versus 5.6 for SBC's retail customers in Texas.[36] However, this performance standard is not an average trouble report rate measured over six months, and for good reason. It is possible to have an average trouble over a six month period while providing very poor service one third of time or more. This would seriously affect CLECs' ability to compete. Adequate performance requires consistent parity each month. SBC fails that test for PM 65-08. Similarly, SBC flunks under PM 67-08 (Mean Time to Restore - Dispatch) because it shows parity only 3 out of the last four months. In approving the Bell Atlantic New York Application, the Commission stated that it would expect a BOC to demonstrate that it performs maintenance and repair in substantially the same time and manner as for its own retail lines.[37] SBC has not met that standard here.

SBC offers a number of excuses as to why it discriminates against CLECs in terms of missed installation due dates. It claims that as a general matter these performance measures require an inappropriate comparison because SBC provides DSL service through line sharing whereas competing providers, until they can obtain line sharing, later this year must order

[36] *Id.*

[37] *New York Order*, para. 335.

separate unbundled loops.[38] SBC claims that it misses due dates for CLECs in many cases because CLECs must obtain a separate loop to provide DSL service but that loops are sometimes unavailable immediately or need repair - which it refers to as "lack of facilities." However, it says that this "lack of facilities" does not happen to SBC's retail operations because SBC provides service through line sharing (which is not yet available to CLECs) which is provided over existing loops. SBC contends that this causes unfair performance results for SBC in terms of missed due dates.[39]

This argument perversely attempts to blame SBC's own poor performance in terms of missed due dates on its own discrimination against CLECs in provision of line sharing. Further, if SBC is not able to present performance data that make sense until line sharing is implemented, the Commission should reject the application on the basis of the present poor showing on missed due dates and direct SBC not to file again until it has implemented line sharing.

In addition, SBC's "lack of facilities" argument has already been found unpersuasive by the Department of Justice. The Department of Justice recommended that the Commission reject this argument because even after line sharing is implemented, CLECs will continue to need unbundled loops for DSL services, including SDSL, that are not able to be provided through line

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38 Chapman/Dysart Affidavit, p. 17.

39 *Id.* pp. 18-21.

sharing with analog voice services.[40] SBC has not provided an explanation of why, it did not raise the "lack of facilities" issue either before the Texas PUC when performance measures were being developed or in its initial application. In reality, the "lack of facilities" argument is a belated and ineffectual attempt to justify its discrimination against CLECs.

Since SBC's data shows that it missed 15.5% of its due dates for DSL loops, while it only missed 5.1 percent of its retail customer due dates for DS1 service, it appears that SBC is engaging in significant discrimination against CLECs in provision of advanced services.[41] Accordingly, SBC's performance concerning missed due dates does not show that it is providing nondiscriminatory access to DSL capable loops.

SBC blames its dismal performance concerning trouble reports (PM 59-08) on CLECs. It claims that CLECs are choosing to test the limits of technology and, therefore, experience a failure rate that is generally higher than that experienced when operated within the recognized parameters established by the industry.[42] However, CLECs are not using equipment that has not been fully testing or that is not available off the shelf from major manufacturers. SBC has provided no evidence supporting its claim that it is CLEC technology that is causing trouble reports on CLEC lines. Accordingly, CLECs are not to blame for SBC's failure to meet parity in

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[40] DOJ March 20, 2000 letter, p. 4.

[41] *Id.* p. 5 citing SBC January Performance Data at 271-No58b (DS1) to 58c (DSL).

[42] *Id.*

quality of loops provided to CLECs. In order to qualify for Section 271 approval, a BOC must show that the quality of loops provisioned to CLECs is substantially the same for the BOC's provision of its own retail advanced services, or that the level of quality is sufficiently high to permit CLECs a meaningful opportunity to compete.[43] SBC has not shown that it meets that standard based on the current application.

In its supplemental filing, SBC admits that it continues to be out of parity for performance measures for provision of BRI loops,[44] but offers a number of excuses that it claims should cause the Commission to disregard its failure to meet the applicable performance measures. SBC contends that the benchmark defining PM 56-03 is "unreasonably ambitious."[45] Similarly, it contends that it will miss due dates for installation of BRI loops to CLECs because the installation interval is too short in that it does not take into account the availability of technicians and facilities.[46] Again, it contends that it is out of parity in provision of quality of BRI loops because the performance measure does not provide SBC sufficient time to design and

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43 *New York Order*, para. 335.

44 Chapman/Dysart Affidavit, p. 24. Based on SBC's February 1, 2000 *ex parte*, it appears that SBC's performance significantly worsened after the Texas PUC evaluated SBC's missed due dates for BRI ISDN loops. (PM 58). SBC delivered 23.3% of CLEC BRI ISDN loops late in December 1999 compared to 15.5% in November 1999.

45 *Id.* p. 25.

46 *Id.* p. 26.

test BRI loops.[47] As with its other attempts to explain away its inadequate performance, SBC has failed to explain why it did not bring up these issues earlier, or if it did, they appear to be no more than disagreement with the performance measures themselves. If SBC disagrees with these performance measures it should withdraw its application, attempt to get the Texas PUC to change them, and then resubmit its application.

IV. THE MERGER CONDITIONS ARE IRRELEVANT TO SECTION 271

At several points in its supplemental filing, SBC seems to assume that compliance with the SBC/Ameritech merger conditions constitutes compliance with the competitive checklist of Section 271.[48] However, compliance with the merger conditions is irrelevant to a determination of compliance with Section 271 because Section 271 checklist obligations are independent of any standards or authority of the Commission to approve mergers. Moreover, the merger conditions specifically authorize SBC to engage in very significant discrimination in provision of services to ASI including provision of line sharing to ASI prior to the time line sharing is available to CLECs, as admitted by SBC.[49] This specifically violates SBC's obligation under Section 271(c)(2)(B)(ii) of the Act to provide nondiscriminatory access to unbundled network elements. The merger conditions also permit SBC and ASI to engage in joint marketing and certain

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[47] *Id.* p. 27.

[48] Lincoln Brown Affidavit p. 4.

[49] Lincoln Brown Affidavit pp. 6, 8.

customer care functions after the sale.[50] Accordingly, the Commission should give no weight to compliance with the merger conditions in evaluating whether SBC has complied with the competitive checklist.

V. CONCLUSION

For the foregoing reasons, the Commission should deny the SWBT Application.

Respectfully submitted,

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Dated: April 26, 2000

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50 Lincoln Brown Affidavit p. 9.

CERTIFICATE OF SERVICE

I, Deborah A. Walker, hereby certify that on April 26, 2000, I caused to be served upon the following individuals the Comments of CCCTX, Inc. d/b/a Connect! in CC Docket 00-65:

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